

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
JENSEN'S KENT PRAIRIE DAIRY,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 84-240

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of a civil penalty for discharging waste to waters of the state in violation of the State Water Pollution Control Act, came on for hearing before the Pollution Control Hearings Board, Gayle Rothrock, Lawrence J. Faulk and Wick Dufford, on October 9, 1984, at Lacey, Washington. Mr. Dufford presided.

Appellant Jensen's Kent Prairie Dairy was represented by its president, Grant Jensen. Respondent, Department of Ecology (DOE) was represented by Charles W. Lean, Assistant Attorney General. Reporter Suzanne Gurich recorded the proceedings.

1 Witnesses were sworn and testified. Exhibits were examined. From
2 the testimony heard and the exhibits examined, the Board makes these

3 FINDINGS OF FACT

4 I

5 Grant Jensen, with his son Dean Jensen, owns and operates a dairy
6 called Jensen's Kent Prairie Dairy near Arlington in Snohomish
7 County. The dairy is a sizable operation involving about 500 head of
8 cattle.

9 II

10 Portage Creek is a natural watercourse tributary to the
11 Stillaguamish River. Two forks of this stream (called here the north
12 and south forks) traverse the Jensen property, joining at a point near
13 its westerly boundary.

14 III

15 Portage Creek is an important stream for the rearing and spawning
16 of native sea-run cutthroat trout and coho salmon in the Stillaguamish
17 system.

18 IV

19 On May 14 and 15, 1984, manure was drained from a field on the
20 Jensen dairy into the north fork of Portage Creek. Immediately prior
21 to its entry into waters of the creek the manure was pumped onto the
22 field from a manure holding pit near the milking area. Stormwaters
23 then washed it into a swale down which it flowed to the creek,
24 entering at an identifiable point. The drainage of the manure into
25

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB No. 84-240

1 the creek was the predictable consequence of pumping it onto the field
2 during rainy weather.

3 V

4 Late on May 14, 1984, a Department of Game biologist observed and
5 smelled evidence of the manure discharge into the north fork of
6 Portage Creek on the Jensen farm. He also observed carcasses of dead
7 fish in the area immediately downstream from the discharge point. On
8 May 15, DOE's biologist found numerous carcasses of dead fish in and
9 along the same reach of the stream. The carcasses were of both
10 juvenile coho and sea-run cutthroat trout. No dead fish were found by
11 either investigator on the south fork or on the north fork above the
12 manure discharge point. Sampling revealed normal fish densities in
13 the north fork above the manure discharge and in the south fork. Fish
14 numbers were depressed in the reach below the manure entry. Both
15 biology experts were of the opinion that the entry of manure into the
16 stream had caused the fish kill. No other explanation of the kill was
17 advanced. The inescapable inference from the observed evidence is
18 that their opinion is correct.

19 VI

20 On May 15, 1984, DOE's water quality inspector took samples from
21 the stream at various sites above, below, and at the point of
22 discharge of the manure. He also sampled waters in the swale from
23 which the manure was entering the north fork. Laboratory analysis
24 showed substantially elevated numbers of fecal coliform organisms in
25 the swale and in the north fork at the point of discharge. The

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB No. 84-240

1 discharge of manure resulted in fecal coliform levels in the stream
2 far exceeding the relevant water quality standard. WAC
3 173-201-045(2)(c)(1)(A), WAC 173-201-070(6), WAC 173-201-080(107).

4 VII

5 A discharge of manure from the Jensen dairy into the north fork of
6 Portage Creek at approximately the same point, and also resulting in a
7 fish kill, occurred on June 13 and 14, 1979. Grant Jensen paid a \$250
8 civil penalty in response to that occurrence and a resource damage
9 claim.

10 VIII

11 After the 1979 episode the Jensens made some efforts to improve
12 the dairy's holding capacity for manure. However the holding pond
13 installed was inadequately sized. The Jensens were aware of this and
14 before the events of May 14 and 15, 1984, had formulated plans to
15 build a larger lagoon. Investment in a manure separator had also been
16 investigated.

17 IX

18 A milk sanitarian from the Department of Agriculture testified to
19 manure handling requirements for dairies. He asserted that the cows
20 must be kept clean and that manure must be removed and kept away from
21 the animals. He inspects the Kent Prairie Dairy periodically, but was
22 not there on May 14 or 15, 1984. While in five years of inspecting he
23 had observed no sanitary violations at the Jensen farm, he stated that
24 the ultimate disposal of manure is not governed by the code he
25 enforces for the State of Washington.

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB No. 84-240

X

Since the events of May 14 and 15, 1984, the Jensens have expended significant amounts of time and money to alleviate drainage problems on their farm and to improve the holding capacity for manure. These efforts have included the construction of a much larger new holding lagoon and the dredging and cleaning of portions of both the north and south fork of Portage Creek to increase the capacity of these watercourses to carry off rainfall. The work in the streambeds has been authorized by hydraulic project approvals (HPA) issued by the Department of Fisheries upon applications made in the summer of 1984. There is no evidence of any applications for such HPA's at any earlier time. The evidence falls far short of demonstrating that the events of May 14 and 15, 1984, were the necessary result of actions of the Department of Fisheries.

XI

In July 2, 1984, DOE issued a notice of civil penalty to the appellant dairy imposing a \$1000 fine for the alleged violation of RCW 90.48.080. The dairy possesses no waste discharge permit authorizing the disposal of wastes in waters of the state.

XII

On July 17, 1984, DOE received an application for relief from penalty pursuant to RCW 90.48.144. This application was denied and the penalty was affirmed by a notice dated August 16, 1984. The instant appeal to this Board followed on September 6, 1984.

XIII

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board comes to these

CONCLUSIONS OF LAW

I

The waters of Portage Creek are waters of the state. RCW 90.48.020.

II

RCW 90.48.080 states:

It shall be unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of the [DOE], as provided in this chapter

III

Appellants violated RCW 90.48.080 by permitting the discharge of manure to waters of the state, which resulted in a fish kill verified by DOE on May 15, 1984. This consequence was clearly pollution, as that term is defined by the statute. RCW 90.48.020.

IV

Appellants violated RCW 90.48.080 by permitting the discharge of manure to waters of the state which resulted in a violation of the relevant water quality standard for fecal coliform organisms. Such standards reflect the determination of DOE as to what constitutes pollution. RCW 90.48.035.

V

RCW 90.48.144 provides for the issuance of civil penalties in an amount up to \$5000 per day for violation of the provisions of RCW 90.48.080. Therefore, the imposition of a penalty in this instance was lawful.

VI

When a penalty may lawfully be imposed, the appropriateness of its amount is a matter involving consideration of factors bearing on its reasonableness. These include:

- a) The nature of the violation;
- b) The prior behavior of the violator;
- c) Actions taken after the violation to solve the problem.

VII

The nature of the violation encompasses such matters as the duration of the offense, the type of requirement violated, and the consequences of the violation. Here, though the penalty imposed is solely for the second day, the unlawful discharge occurred over two days. The violation was not of a technology-based effluent limitation, but rather of a standard set for the receiving medium (the creek) to protect from environmental harm. Moreover, environmental harm, in fact, occurred in the form of a fish kill involving species known to be of significant commercial or sport fishing importance.

VIII

The prior behavior of the violator involves a previous offense for the same violation for which a smaller penalty was imposed. After this earlier violation, some remedial steps were taken, but the

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER
PCHB No. 84-240

1 problem was not solved and the Jensen's were aware that this was the
2 case.

3 IX

4 However, since the events at issue here, the Jensens have taken
5 vigorous and expensive action to improve drainage and expand manure
6 holding capacity in an attempt to prevent any recurrence of unlawful
7 discharges to the stream.

8 X

9 Looking at the entire array of facts and circumstances, the
10 imposition of a \$1000 penalty, one-fifth of the statutory maximum, is
11 not unreasonable, particularly in light of the actual resource damage
12 which occurred.

13 XI

14 Any Finding of Fact which should be deemed a Conclusion of Law is
15 hereby adopted as such.

16 From these Conclusions the Board enters this
17
18
19
20
21
22
23
24
25

ORDER

Civil Penalty No. De 84-365 is affirmed.

DATED this 6th day of November, 1984.

POLLUTION CONTROL HEARINGS BOARD



WICK DUFFORD, Lawyer Member



GAYLE ROTHROCK, Chairman

See Dissenting Opinion

LAWRENCE J. FAULK, Vice Chairman

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER
PCHB No. 84-240

1 DISSENTING OPINION - LAWRENCE J. FAULK

2 I disagree with the majority. I would suspend the penalty. The
3 most recent case where the Board had a similar case was PCHB No.
4 83-11, Courtright Cattle Company v. DOE.

5 In that case, the Board found a technical violation, but suspended
6 the penalty because of the appellant's effort to control the manure
7 problem. I would come to the same conclusion in this case although
8 the circumstances are different.

9 The appellant had a violation of RCW 90.48.080 in 1979.
10 Subsequent to that violation, he constructed a lagoon to contain the
11 manure. In March of 1984, he received approval to contract another
12 lagoon (13' deep x 255' x 255'). In May of 1984, there were heavy
13 rains. His existing pond was overflowing and in order to correct the
14 problem he pumped the manure on the field when it eventually ran into
15 a creek on his property resulting in a fish kill.

16 From this incident he received a \$1000 penalty which is the
17 subject of this appeal.

18 In the meantime, he began cleaning out the creeks that surround
19 his property; installing culverts to allow the creeks to pass under
20 roadways; constructing two sediment ponds and; installing logs in the
21 creeks to allow the fish to go upstream in addition to building the
22 manure holding point previously described. This has cost him
23 approximately \$17,000 out of pocket funds.

1 All of these improvements were accomplished to enable the creeks
2 to flow properly so that they would not drain down into the manure
3 holding pond and cause it to exceed its capacity.

4 He had tried unsuccessfully to get the Department of Fisheries to
5 clean out the creeks. Their response was that it would take two years
6 to get the paperwork through the system. The actual work consumed
7 approximately 49 hours.

8 He testified that in 1981, his farm lost \$51,597; and in 1982 lost
9 \$44,112.

10 For the majority to fine the appellant a \$1000 after as much
11 effort as he has put forth to correct the problem doesn't make sense
12 to me; especially when he could not get the Department of Fisheries to
13 correct the problem.

14 It seems to me our job is to interpret the law in a fashion that
15 results in justice.

16 In this case justice would demand that the penalty be suspended.

17
18  11/5/84
19 LAWRENCE J. FAULK, Vice Chairman
20
21
22
23
24
25